Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

THE STATE OF ARIZONA, *et al.*,

Petitioners,

v.

EVAN ARTHUR HOOK, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
Attorney General

TIM DELANEY
Solicitor General

THOMAS J. DENNIS
Counsel of Record
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-7683
Counsel for the Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Can a district court hold a state prison official in civil contempt for issuing a notice informing inmates that in thirty days sexually explicit publications would be prohibited in Arizona's prisons, when: (a) the allegedly contemptuous prohibition was withdrawn two days before it became effective, one week before the contempt hearing even started, and three months before the district court issued its finding of contempt, (b) when no publications were withheld because of the notice, and (c) when this Court's decisions make clear that civil contempt is to be used solely for remedial or coercive purposes and do not recognize the doctrine of anticipatory repudiation in the law of contempt?

PARTIES TO THE PROCEEDING BELOW

Petitioners are the State of Arizona, Terry L. Stewart, the current Director of the Arizona Department of Corrections, and Samuel A. Lewis, who held the position of Director during the proceedings below.

The Respondents were Arizona inmates who brought a civil rights action challenging mail regulations at the Arizona prisons in 1973. They include Evan Arthur Hook, John Purdy, Muriel R. Thigpen, Gregory A. Cottrell, Donald Adsitt, Jr., Murry Mathews, Christopher Keohane, Michael A. Troutman, Daniel Gutierrez, James Lee Hess, Bennie Lee West, Charles Bucher, Melvin Munroe Littrell, and Clifton Blockinger. This contempt proceeding was brought on behalf of current inmate beneficiaries of a Consent Decree entered in 1973.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals opinion is not reported. Appendix ("App.") A. The judgment of the United States District Court for the District of Arizona is also not reported. App. B.

STATEMENT OF JURISDICTION

On October 19, 1995, the court of appeals entered the judgment from which review is sought. App. A. On January 30, 1996, the court denied rehearing. App. D. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as –
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

STATEMENT OF THE CASE

In 1973, the Arizona Department of Corrections ("ADOC") entered into a Consent Decree with several inmates who had filed suit claiming that ADOC's mail policies were unconstitutional. (App. C.) The Consent Decree created new mail regulations for ADOC, and provided in pertinent part:

> *Publications* Residents may receive books, newspapers and periodicals etc., if mailed directly by the publisher or book retailer. Individual issues of publications will be excluded if they contain instructions on the manufacturing of homemade weapons, bombs, explosives, escape material, brewing of alcoholic beverages, or if they otherwise contain material which constitutes a direct and immediate threat to the security, safety or order of the institution, or if they contain any material which is deemed obscene under applicable constitutional standards. Prompt written notice will be given a resident if any publications are excluded for the above reasons. Upon request, the resident will be given an opportunity to discuss the reasons for the exclusion with the Deputy Superintendent for Programs, whose decision shall be final.

(*Id.* at 35-36.)

On January 31, 1994, ADOC's Director, Samuel A. Lewis, issued a notice addressed to all inmates stating that "[e]ffective February 27, 1994, all magazines that are devoted to sexual themes . . . are not authorized in the Arizona Prison System." (Plaintiffs' Exhibit 16, Defendants' Exhibit 1; See App. B at 10-11.) This notice was to be "posted in inmate access areas for 30 days prior to the above referenced effective date." (*Id.* at 11.) Director Lewis testified that the ban was desired because sexually explicit magazines create a hostile and dangerous environment for female prison staff. (Testimony of Director Lewis, March 8, 1994 Hearing, C.D. 337 "TR" at 67; *see also* App. B at 12.)

On February 17, 1994, the inmates' court-appointed counsel informed ADOC's counsel that, in their opinion, the proposed prohibition violated the 1973 Consent Decree. (Testimony of John Frank, TR at 107; *see also* App. B at 12.) On February 23, 1994, the inmates' counsel wrote to ADOC's counsel, stating that "by Friday February 25 you will either give us your view as to why this is not a contempt or present for immediate consideration a reasonable proposal for modification of the order." (Plaintiffs' Exhibit 17; *see also* App. B at 13.) On February 24, 1994, ADOC's attorney informed the inmates' counsel that Director Lewis would not withdraw his proposed order. (Joint Prehearing Statement, C.D. 329 at 7; *see also* App. B at 13.)

On February 25, 1994, the inmates' counsel filed a petition in the district court seeking both civil and criminal contempt sanctions against Director Lewis personally for his alleged violation of the 1973 Consent Decree. (C.D. 313, 314.) However, on that same day at approximately

1:00 p.m., Director Lewis decided at a meeting with officials of the Arizona Governor's Office that, although he did not feel it was required, he would rescind the January 31 notice and seek to implement the policy through a motion to modify the Consent Decree. (Testimony of Director Lewis, TR at 72; *see also* App. B at 13.) At approximately 2:00 p.m. the same day, the inmates' counsel informed ADOC's attorney that a hearing on the civil and criminal contempt sanctions would be held that afternoon at 3:00 p.m. (Joint Prehearing Statement, C.D. 329 at 7; *see also* App. B at 13.) Either during that conversation, or shortly thereafter, ADOC's attorney informed the inmates' counsel that Director Lewis had decided to withdraw the January 31 directive. (Joint Prehearing Statement, C.D. 329 at 8; *see also* App. B at 14.) Later, at the hearing, ADOC's attorney affirmed in open court that Director Lewis had withdrawn the January 31 directive. (Joint Prehearing Statement, C.D. 329 at 9; *see also* App. B at 14.)

While the hearing was underway in the district court, between 3:00 and 3:30 p.m., Director Lewis issued a memorandum to all prison wardens rescinding the January 31 notice and directed his staff to inform each warden verbally that the inmates should be informed that the notice was withdrawn.[1] (Defendants' Exhibit 2; Testimony of Director Lewis, TR at 73; *see also* App. B at 14-15.)

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[1] The rescission order was directed to the wardens, not the inmates, because only the wardens had the authority to advise the mail rooms not to halt receipt of sexually explicit magazines.

Thus, the January 31 notice was rescinded before the proposed order took effect. No inmate was denied delivery of a single publication because of the January 31, 1994 notice. (Testimony of Director Lewis, TR at 68; *see also* App. B at 15.)

Despite the Director's retraction of the January 31 notice, the district court ordered a hearing on the request for civil contempt, which was held on March 8, 1994. (C.D. 330, 337.) On June 8, 1994, over three months after the Director rescinded the January 31 notice, the district court issued its order finding that "Director Lewis was in civil contempt when he issued his January 31, 1994 order." (C.D. 354, App. B at 22.) As a sanction, the court awarded the inmates' counsel their attorneys' fees for time spent pursuing the contempt action. (*Id.*) The court issued the contempt sanction against Director Lewis personally, stating that the sanctions "are not to be borne by the taxpayers of the state in any way." (App. B at 24.)

In a two sentence memorandum decision,[2] the court of appeals reversed the personal nature of the sanction

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[2] The memorandum decision addressed the consolidated appeals from both the finding of contempt and the later order setting the amount of attorneys' fees. Petitioners do not seek review of the court of appeal's affirmance of the district court's August 4, 1994 Order, in which the district court set the amount of the attorneys' fees sanction and ruled on various other matters. Consequently, the lengthy August 4, 1994 Order is not set forth in the Appendix. However, a copy of this Order has been sent to the Clerk of this Court to expedite any necessary review of the August 4, 1994 Order.

against Director Lewis, but affirmed the contempt finding, declaring without explanation that the district court had not abused its discretion. (App. A.)

REASONS TO GRANT THE PETITION

I. THE LOWER COURTS' CIVIL CONTEMPT RULINGS CONFLICT WITH THIS COURT'S PRECEDENT REQUIRING THAT CIVIL CONTEMPT BE COERCIVE OR REMEDIAL.

Unquestionably, federal courts have the inherent power to enforce compliance with their lawful orders through civil contempt. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). However, while " 'remedial powers of an equity court must be adequate to the task, . . . they are not unlimited.' " *Spallone v. United States*, 493 U.S. 265, 276 (1990) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971)). "[T]he contempt power also uniquely is 'liable to abuse.' " *International Union, United Mine Workers of America v. Bagwell*, 114 S. Ct. 2552, 2559 (1994) (quoting *Bloom v. Illinois*, 391 U.S. 194, 202 (1968) and *Ex parte Terry*, 128 U.S. 289, 313 (1888)). The judiciary must, therefore, be ever vigilant to protect against the arbitrary exercise of the awesome power of contempt. *See International Longshoremen's Assn., Local 1291 v. Philadelphia Marine Trade Assn.*, 389 U.S. 64, 76 (1967) ("The judicial contempt power is a potent weapon," and when used improperly, "it can be a deadly one.").

This Court has created a simple test for deciding if a civil or criminal contempt has occurred in a particular circumstance: "what does the court primarily seek to

accomplish by imposing sentence?" *Shillitani*, 384 U.S. at 370. "If [relief] is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if [relief] is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Id.* (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911)). Thus, civil contempt proceedings are employed either to " 'coerce the defendant into compliance with the court's order, [or] to compensate the complainant for losses sustained.' " *Local 28 of Sheet Metal Workers' International Assn. v. E.E.O.C.*, 478 U.S. 421, 443 (1986) (quoting *United States v. Mine Workers*, 330 U.S. 258, 303-04 (1947)).

In *Gompers*, this Court gave as an example the situation where a party to a divorce proceeding refuses to pay court-ordered alimony, or to surrender property ordered to be turned over to another. In those circumstances, the contumacious party could be punished in civil contempt until the party complied with the order. 221 U.S. at 442. In such cases, the punishment "is not to vindicate the authority of the law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant." *Id.*

Applying this Court's test to the circumstances presented here, the conclusion is inescapable that the district court did not act within its authority when it held Director Lewis in civil contempt because the order contemplated in the allegedly contemptuous January 31 notice never went into effect. Any threat of non-compliance that existed when Director Lewis issued the January 31 notice, which announced that in thirty days sexually explicit materials would be prohibited in Arizona's prisons, vanished when Director Lewis withdrew the proposed

prohibition. No inmate lost a single publication because of the Director's actions.

No remedial or coercive purpose could be served when the district court held its hearing a week after the January 31 notice was withdrawn, and certainly three months later when the district court entered its order finding Director Lewis in civil contempt. There was nothing to remedy, and no threat remaining that required coercion.

Thus, either the district court found civil contempt in disregard of this Court's decisions reserving such a finding to situations requiring remediation or coercion, or the district court actually rendered its contempt finding to vindicate its authority, in which case it constitutes an improper criminal finding without the benefit of the necessary criminal protections, such as proof beyond a reasonable doubt. *See Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 632 (1988). In either case, the district court and the court of appeals ignored this Court's well established case law. This Court should grant certiorari to correct the misapplication of its precedent.

II. THE LOWER COURTS' DECISIONS INTRODUCE FOR THE FIRST TIME THE CONCEPT OF ANTICIPATORY REPUDIATION INTO THE LAW OF CONTEMPT.

The district court's decision also deserves this Court's attention because it raises a substantial issue of national importance that has not been decided by this Court, or by apparently any other court. Assuming the district court's decision can truly be characterized as civil

contempt, for the first time in reported federal jurisprudence, the lower courts have introduced the concept of "anticipatory repudiation" into the law of contempt. Neither this Court, nor any other federal court, has ever held a state official in contempt of court for issuing a proposed directive that never became effective. Good reason exists for this dearth of authority; absent an actual violation of a court order, there can be no contempt.

To borrow from this Court's example in *Gompers*, a person can say that he will not pay his alimony, or threaten not to turn over property to another. If, however, on the day compliance is due, the person nevertheless complies with the applicable court order, civil contempt has not occurred. A court cannot hold the party in contempt for merely stating his intent to violate the court's order at a future time.

To hold otherwise, as the lower courts have done here, takes the law of contempt onto a slippery slope subject only to the arbitrary whim of a particular district court judge. All parties that become bound to a court's order need to be able to understand clearly and in advance the methods by which compliance with the court order will be enforced. Most importantly, parties are entitled to know the means by which contempt can be avoided. Under the current law of civil contempt, compliance is the key to freedom from sanction, and the contemnor himself holds the key "in his own pocket." *Gompers*, 221 U.S. at 442. If this Court allows the lower courts' decisions to stand, compliance itself is no longer a guarantee of freedom, because even months after compliance has occurred, a finding of civil contempt could still be entered.

This result is especially detrimental in this case, where the finding of contempt was entered against an official charged with running a state prison. This Court has acknowledged the greater expertise of prison officials concerning issues of penal management, and has specifically directed that courts should defer to prison administrators in resolving the day-to-day problems in managing a prison. *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989). Judicial deference to the judgment of prison administrators stems not only from the judiciary's limited competence in penal management, but also from the doctrine of separation of powers. As this Court stated in *Turner v. Safley*, 482 U.S. 78, 84-85 (1987):

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.

See also Bell v. Wolfish, 441 U.S. 520, 548 (1979) (same); *Missouri v. Jenkins*, 115 S. Ct. 2038, 2054 (1995) (state institutions should be run by state and local authorities).

Here, Director Lewis issued his January 31 notice setting forth a future prohibition on sexually explicit magazines in conformance with the express terms of the 1973 Consent Decree, which specifically gave ADOC the ability to restrict publications that were found to be a threat to the orderly administration of the prison. Then, after being told that a dispute existed concerning the

notice, and before the proposed order took effect, Director Lewis withdrew it. Director Lewis should be able to rely on this Court's controlling authority on contempt law, which states that his withdrawal of the offending proposal nullifies any question of his compliance with the Consent Decree.

Nevertheless, the district court disregarded this authority, carried forward with the contempt hearing, and three months after Director Lewis withdrew the notice, entered a finding of civil contempt. This result, which allows a federal court to issue contempt sanctions against a state prison official not for what was done, but for what was contemplated and withdrawn, makes impossible the already difficult task of prison management.

Neither the inmates nor the lower courts have been able to cite to any case from this Court, or any federal court, recognizing "attempted contempt" or "anticipatory repudiation" in the law of contempt. This Court should stand firm against the lower courts' attempt to so broaden the law of contempt by granting certiorari and reversing the misapplication of contempt law in this case.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

GRANT WOODS
Attorney General

TIM DELANEY
Solicitor General

THOMAS J. DENNIS
Counsel of Record
Assistant Attorney General
Arizona Attorney General's Office
1275 West Washington
Phoenix, Arizona 85007
(602) 542-7683
Counsel for the Petitioners

March 19, 1996

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVAN ARTHUR HOOK, et al., Plaintiff-Appellee, vs. SAMUEL LEWIS, Director of the Arizona Department of Corrections, STATE OF ARIZONA, et al., Defendants-Appellants.	No. 94-16190 D.C. No. CV-73-00097-CAM
EVAN ARTHUR HOOK, et al., Plaintiff-Appellee, vs. STATE OF ARIZONA, et al., Defendant-Appellant.	No. 95-15105 D.C. No. CV-73-00097-CAM ORDER*

Appeal from the United States District Court
for the District of Arizona
C.A. Muecke, District Judge, Presiding

Argued and Submitted August 17, 1995
San Francisco, California

(Filed Oct. 19, 1995)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: KOZINSKI and NOONAN, Circuit Judges, BREWSTER**, District Judge

For the reasons stated in the district court's Orders of June 3, 1994, and August 4, 1994, the contempt sanctions imposed on Appellant Samuel Lewis for violation of the October 19, 1973, Consent Decree are AFFIRMED.

The district court's order of June 3, 1994, that the sanctions "are not to be borne by the taxpayers or the State," is REVERSED. *Spallone v. United States*, 493 U.S. 265 (1990).

** The Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EVAN HOOK, et al., Plaintiffs, vs. STATE OF ARIZONA, et al., Defendants.	No. CIV 73-97 PHX CAM ORDER (Filed June 3, 1994)

Having considered the evidence presented concerning plaintiffs' petition for contempt, the Court concludes as follows:

BACKGROUND

The history of this lawsuit spans more than twenty-one years. Originally, this lawsuit arose, in part, from a dispute about mail regulations and restrictions in the Arizona Department of Corrections ("ADOC"). Evan Hook and ten other inmates in the ADOC filed a lawsuit alleging violations of their First and Fourteenth Amendment rights concerning the ADOC mail policies. Among several other issues, the inmates claimed they had constitutional rights to receive Playboy, as well as the right to send and receive mail and certain types of letters.

In 1973, the parties entered into a *STIPULATED* consent decree ("the Decree"). The Decree included a comprehensive scheme of mail regulations. On October 19,

1973, this Court entered an order approving the stipulation for the Consent Decree[1]. The Decree was amended one time, on May 10, 1974[2].

This lawsuit, and Consent Decree, has generated some controversy over the past few years. In particular, another section of the mail regulations in the Decree involving the receipt of Christmas food packages by Arizona State prison inmates has required quite a bit of attention. In the original Decree, the ADOC agreed to allow each inmate to receive up to three, twenty-five pound packages between December 10th and 31st of each year[3].

On October 4, 1990, Director Lewis attempted to institute a new policy reducing the inmates to one twenty-five pound package, as well as instituting various other restrictions[4]. This new policy was implemented without seeking a modification of the Decree, and was in direct disregard of the Consent Decree. This Court enjoined defendants from modifying the terms of the Decree, without filing a motion for modification[5].

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[1] Plaintiffs' Exhibit 15.

[2] Pursuant to a stipulation of the parties, certain paragraphs of Section VI and VII of the Decree were changed.

[3] Plaintiffs' Exhibit 15.

[4] Docket Numbers 18 and 29; Fact 2, Joint Prehearing Statement, at 7.

[5] In the Order of December 11, 1990, this Court stated, among other matters:

> . . .
>
> (2) The defendants are enjoined, restricted and prohibited from making any changes in the

Defendants appealed. The Ninth Circuit affirmed this Court determined that ADOC improperly attempted to change the provisions of the Consent Decree, and agreed with this Court that the proper method to change the Decree is to petition the District Court for a modification pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. *Hook v. Arizona*, 972 F.2d 1012 (9th Cir. 1992)[6].

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implementation of Christmas food packages received pursuant to the Consent Decree approved by this court in *Hook v. State of Arizona* unless this court issues an order otherwise.

[6] The Ninth Circuit stated:

We begin our analysis of this issue by noting that consent decrees are essentially contractual agreements that are given the status of a judicial decree. Contract principles are generally applicable in our analysis of consent decrees, provided contract analysis does not undermine the judicial character of the decree. *See, e.g., Thompson v. Enomoto*, 915 F.2d 1383, 1388 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 965 (1992). Key to the present case, consent decrees are construed as contracts for purposes of enforcement. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975); *see also Martin v. Wilks*, 490 U.S. 755, 788 n.27 (1989) (Stevens, J., dissenting).

. . .

The Department should have sought an order to vacate or modify the consent decree under Fed.R.Civ.P. 60(b)(5)-(6).

The proper procedure for seeking relief from a consent decree is a Rule 60(b) motion.

There is no suggestion in these [institutional reform] cases that a consent decree is not subject to Rule 60(b). A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in

On October 30, 1992, the ADOC filed a motion to modify the *Hook* consent decree. In particular, defendants requested that this Court remove the provision of paragraph V, which allows the inmates to receive Christmas food packages. At a minimum, the defendants had known since July 23, 1992 when the Ninth Circuit issued its opinion that the proper procedure to request modification was to file a motion to modify the Consent Decree in this court.

On November 19, 1992, November 23, 1992 and December 2, 1992, Director Lewis and the ADOC issued memorandums announcing a new policy requiring consumption of the food packages by a particular date. This was in direct disregard of this Court's and the Ninth Circuit's orders. This Court enjoined defendants from implementing the new policy, because it violated the terms of the Decree and prior court orders. This Court stated, in an Order of January 12, 1993:

> Until there is an evidentiary hearing and the court has issued a ruling on the motion to modify in this case, the injunction issued on December 11, 1990 is in effect and the defendants cannot circumvent the injunction or violate that

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> nature. But it is an agreement that the parties desire and expect will be reflected in and be enforceable as a judicial decree that is subject to the rules generally applicable to other judgments and decrees.

Rufo v. Inmates of the Suffolk County Jail, 112 S.Ct. 748, 757 (1992); *see also Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1340 (9th Cir. 1981) (relief from any provision of a consent decree "must be considered under Rule 60 of the Federal Rules of Civil Procedure").

injunction piece by piece until there is nothing left of the *Hook* consent decree. As this Court has already informed defendants on numerous occasions since 1990, changes to the Hook decree are possible. However, the opportunity to make the changes was not presented to this Court until October 30, 1992, three months after the Ninth Circuit opinion and two years after this Court informed defendants that they should move to modify rather than ignore the decree. If the Defendants believe that changes should be made to the *Hook* decree, they should present evidence as to why changes should be made at the evidentiary hearing that they have requested in this matter. Prior to the hearing and a decision by this Court, defendants cannot unilaterally change the law. An institution dedicated to law such as the Arizona Department of Corrections should not violate the law and should follow that law until it is changed. This is a fundamental principle of United States Constitutional Law.

Order of January 12, 1993.

FINDINGS OF FACT

This petition for civil contempt arises from Director Lewis' issuance of a memorandum on January 31, 1994 restricting certain types of magazines the inmates may receive.[7]

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[7] Defendants' Exhibit 1.

The policy of the 1973 Consent Decree stated the following[8]:

POLICY:

> The flow of mail between persons outside the facility of the Department of Corrections with institution residents is encouraged for the purpose of maintaining constructive family and community ties, facilitating resolving of legal affairs, assisting the attainment of educational or vocational goals and stimulating motivations for self-improvement. Supervision of mail on a selective basis is an essential precaution required in the institution in the interest of the safety of personnel and security of the facility. Correspondence with persons outside the institution has potentially beneficial effects, including but not limited to maintaining family or other community resources desirable for planning for release on parole or after discharge by completion of sentence. Citizens outside the institution have a right to be informed as to the operation of *their* correctional facilities directly from the residents of them. However the mail may not be used for illegal purposes or to introduce unauthorized materials into the institution.

The Decree also stated:

I INCOMING MAIL:

> All incoming mail will be opened for inspection for contraband only. Incoming mail from a resident's attorney of record or from a judge or court will be opened for inspection purposes in

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[8] Plaintiffs' Exhibit 15; Joint Prehearing Statement.

the presence of the resident. No incoming mail will be read or censored.

. . .

II OUTGOING MAIL:

. . .

Residents may correspond with the publisher or editor of any newspaper, news magazine or periodical of general distribution, national or international news service or to the station manager of any radio or television station. Such mail will not be censored or read but will be inspected for contraband.

. . .

Standards for Censorship

Contents of censored mail may be returned to the resident, or retained by the institution, or deleted from the mailing (the balance of which shall be mailed) where the contents or communications either would or might pose a direct and immediate threat to the security, safety or order of the institution; or are obscene under applicable constitutional standards; or would or might substantially hinder efforts to threat or rehabilitate the resident; or would otherwise constitute a violation or circumvention of these correspondence regulations or the institution's disciplinary rules and regulations.

. . .

III PUBLICATIONS

> Residents may receive books, newspapers and periodicals etc., if mailed directly by the publisher or book retailer. Individual issues of publications will be excluded if they contain . . . on the manufacturing of homemade weapons, bombs, explosives, escape material, brewing of alcoholic beverages, or they otherwise contain material which constitutes a direct and immediate threat to the security, safety or order of the institution, or if they contain any material which is deemed obscene under applicable constitutional standards. Prompt written notice will be given a resident if any publications are excluded for the above reasons. Upon request, the resident will be given an opportunity to discuss the reasons for the exclusion with the Deputy Superintendent for Programs, whose decision shall be final.

On January 31, 1994, Director Samuel Lewis issued a memorandum to "all inmates" stating:

> It has come to my attention that IMP302.4[9] dated October 4, 1990 has been misinterpreted by members of my staff and inmates. Effective February 27, 1994, all magazines that are devoted to sexual themes and/or show the exposed breasts or genital areas of men or women are not authorized in the Arizona Prison System. Magazines such as Playboy, Playgirl, Hustler, Penthouse, Maxi, Genesis, Fox and Snuff, are included in this list as are others that fit the above criteria.

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[9] IMP means Internal Management Policy.

> These items will no longer be allowed through the mail rooms and existing copies in cells will be picked up as contraband. Those of you who have subscriptions are advised to cancel them or give a forwarding address to the mail room or distributor so that they can be mailed to your home or wherever you designate.
>
> These types of magazines are viewed as a potential threat to prison security which is based on various court rulings including *Cox v. Embly,* a 1992 case out of the Eastern District of Missouri.
>
> This notice shall be posted in inmate access areas for the thirty days prior to the above referenced effective date[10].

Director Lewis became aware of the Consent Decree in approximately 1988.[11] Director Lewis was aware of both the district court's decision and the fact that it was affirmed by the Ninth Circuit.[12]

Several times in November or December 1993, Mr. Lewis discussed his proposed ban on magazines with Mr. Highler and Mr. Davis of the Governor's staff in preparation for a press release for Governor Symington.[13]

The Governor issued a press release dated January 29, 1994 which stated that the Governor "directed" Sam

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[10] Plaintiffs' Exhibit 16, Defendants' Exhibit 1; Testimony of Lewis, Transcript at 69.

[11] Testimony of Lewis, Transcript at 31.

[12] Testimony of Lewis, Transcript at 38-40.

[13] Testimony of Lewis, Transcript at 74 and 76.

Lewis to inform the prisoners that certain magazines would be banned.[14]

Despite the press releases' express language, Mr. Lewis states that he was not so directed by the Governor and that the decision to order the magazine ban was entirely his own, "no one else's."[15]

Mr. Lewis testified that he ordered the magazine ban, not because he thought the magazines were obscene but rather, because of, "the hostile working environment created by inmates who view these magazines and [who] become aroused and attack my female staff."[16]

Mr. Lewis also testified, however, that when he issued the January 31 order he did not possess, and was not aware of, any reports or studies which would establish a causal link between the magazines and violence in the prisons.[17]

Counsel for the parties arranged and attended a meeting to discuss settlement of the motion to modify (the Christmas package provision) on February 17, 1994. At that meeting, inmates' counsel, Mr. Frank, "called to the attention of opposing counsel that the publication order had been entered and that it appeared to be in flat violation of the outstanding order of the Court . . . "[18]

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[14] Plaintiffs' Exhibit 21.

[15] Testimony of Lewis, Transcript at 81.

[16] Testimony of Lewis, Transcript at 67.

[17] Testimony of Lewis, Transcript at 97-98.

[18] Testimony of Frank, Transcript at 107; Stipulated Fact 5, Joint Prehearing Statement, at 7.

On February 23, 1994 Mr. Frank wrote to defendants' counsel, Mr. Bueler, summarizing the developments of the February 17 meeting and stating, "by Friday February 25 you will either give us your view as to why this is not a contempt or present for immediate consideration a reasonable proposal for modification of the order."[19]

On Thursday, February 24, 1994, the Assistant Attorney General representing the defendants advised plaintiffs' counsel that Mr. Lewis would not withdraw his January 31 order.[20]

On Friday, February 25, 1994, at approximately 2:00 p.m., the Attorney General's representative was advised that application for various types of contempt and sanctions would be made at 3:00 that afternoon.[21]

Unknown to inmates' counsel, at a 1:00 p.m. meeting with the Governor's staff on February 25, 1994, Director Lewis concluded, along with the Governor's staff, to "take the advice of counsel, which was to go with a motion to modify, and so I notified Mr. Bueler," somewhere between 1:00 and 2:00 in the afternoon of February 25.[22]

During a 2:00 p.m. conversation or shortly thereafter, counsel for Director Lewis advised counsel for plaintiff

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[19] Plaintiffs' Exhibit 17.

[20] Stipulated Fact 6, Joint Prehearing Statement at 7.

[21] Stipulated Fact 7, Joint Prehearing Statement at 7.

[22] Testimony of Lewis, Transcript at 72.

that Director Lewis would not enforce his January 31st order.[23]

The inmates brought a petition for criminal and civil contempt and sanctions, and, at a 3:00 p.m. hearing, requested that the Court schedule a hearing at which Director Lewis would be required to show cause why he should not be held in contempt.[24]

On February 25, 1994, in open court, around 3:30 p.m., counsel for the defendants represented that Director Lewis was backing off his position and would not enforce his January 31, 1994 order.[25] No written withdrawal was offered at that time and no motion to modify the consent decree has been made to this date.[26]

In response to the representation that Director Lewis would not be enforcing his order, the inmates dropped their petition for criminal contempt, and accordingly amended their petition to one for civil contempt only.[27]

After informing Mr. Bueler that he intended to withdraw his January 31 order, defendant Lewis directed his staff to draft a memorandum reflecting that decision.[28]

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[23] Stipulated Fact 8, Joint Prehearing Statement at 8.

[24] Inmates' Petition in Connection with Criminal Contempt, Civil Contempt and Sanctions, In The Alternative, and For Related Orders, filed February 25, 1994.

[25] Stipulated Fact 9, Joint Prehearing Statement at 8.

[26] Transcript, at 3-9; Stipulated Fact 9, Joint Prehearing Statement at 8.

[27] Amended Petition in Connection With Civil Contempt and Sanctions.

[28] Testimony of Lewis, Transcript at 73.

Director Lewis' memorandum dated February 25, withdrawing the order in his January 31 memorandum, was prepared "within the neighborhood of 3:00 to 3:30" p.m. on February 25, 1994.[29]

Director Lewis sent the memorandum withdrawing the ban to "all wardens."[30] Director Lewis testifies that the February 25, 1994 memorandum was addressed to the wardens instead of all the inmates because the wardens have the authority to advise personnel at the mail rooms at the various institutions not to halt the introduction of the magazines.[31]

No inmates were denied publications as a result of the original memorandum.[32]

A show cause hearing to determine whether Director Lewis' January 31 order constituted civil contempt was held before this Court on March 8, 1994 during which evidence was presented and testimony given.[33]

The inmates incurred attorneys' fees in bringing this matter to the Court's attention and obtaining Director Lewis' compliance with the Consent Decree, both before and after Director Lewis chose to withdraw his order.[34]

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[29] Testimony of Lewis, Transcript at 73.

[30] Defendants' Exhibit 2, Testimony at 69-70.

[31] Testimony of Lewis, Transcript at 69-70.

[32] Testimony of Lewis, Transcript at 68, Defendants' Exhibit 2.

[33] Docket number 330.

[34] Testimony of Frank, Transcript at 109-110.

Exhibit 1 to Ms. Hartland's affidavit and any subsequent supporting documents in support of plaintiffs' application for attorneys' fees is a true and accurate representation of the attorneys' fees incurred by plaintiffs in bringing the contempt matters to the Court's attention, as of March 2, 1994.[3536]

CONCLUSIONS OF LAW

This Court has jurisdiction to enforce its judgments, including consent decrees. *Hook v. Arizona Dep't of Corrections*, 972 F.2d 1012, 1014 (9th Cir. 1992) (even if consent decree was overly broad in violation of the Eleventh Amendment, the Department of Corrections could not simply ignore the decree); *City of Las Vegas v. Clark Cty.*, 755 F.2d 697, 701 (9th Cir. 1984) ("A consent decree is a judgment which has res judicata effect and may be enforced by judicial sanctions.").

The proper procedure for modifying a consent decree is by motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. *In re Novak*, 932 F.2d 1397, 1401 (11th Cir. 1991) ("Court orders have to be obeyed until they are reversed or set aside in an orderly fashion."); *Hook v. Arizona Dep't of Corrections*, 972 F.2d at 1016; see generally *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d

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[35] Stipulated Fact 10, Joint Prehearing Statement at 8.

[36] Plaintiffs have submitted an affidavit for attorneys' fees in the amount of $7,917.00. However, additional fees may have accrued. Additionally, defendants' counsel requested, in open court, that he have the opportunity to object to the amount of fees should Director Lewis be found in contempt. Transcript, at 104; Plaintiff's Exhibit 18.

1338, 1340-41 (9th Cir. 1981) (holding that Rule 60(b) applies to consent judgment).

The United States Supreme Court has stated:

> There is no suggestion in these cases that a consent decree is not subject to Rule 60(b). A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in and be enforceable as a judicial decree that is subject to the rules generally applicable to other judgments and decrees.

Rufo v. Inmates of Suffolk Cty. Jail, ___ U.S. ___, 112 S.Ct. 748, 757 (1992).

Although the scope of a consent decree must be discerned within its four corners, a court may consider surrounding circumstances as aids in construing the consent decree. *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 626 F.2d 95, 98 (9th Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981).

A district judge who oversaw the entire litigation process through the consent decree, to subsequent interpretation of the judgment, are in the best position to interpret the consent judgment. *United States v. Buckley*, 689 F.2d 893 (9th Cir. 1982). Substantial deference is given to a district court's exercise of discretion in determining whether there has been a contempt of a court order where that court has overseen a large, public institution for a long period of time. *Stone v. City and County of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992).

A consent decree is a judgment which has *res judicata* effect and may be enforced by judicial sanctions. *SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984). Plaintiff [sic] seek to have this Court impose civil contempt sanctions in the amount of the attorneys' fees and costs incurred to bring this petition for civil contempt. The relief plaintiffs seek is expressly authorized by statute, 18 U.S.C. 401(3):

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as –
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistant to its lawful writ, process, order, rule, decree, or command.

There are three types of contempt sanctions: punitive (a criminal contempt sanction), compulsory and compensatory (civil contempt sanctions). *United States v. Asay*, 614 F.2d 655, 659 (9th Cir. 1980). Civil contempt is appropriate against state officials for failing to comply with court orders. *Hutto v. Finney*, 437 U.S. 678 (1978); *Perry v. O'Donnell*, 759 F.2d 702, 705 (9th Cir. 1985).

Sanctions for civil contempt may be imposed to coerce obedience to a court order, or to compensate the party pursuing the contempt action for injuries resulting from the contemptuous behavior, or both. *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947). If the contempt sanction is compensatory, those sanctions must

be limited to actual losses sustained as a result of the contemptuous behavior. *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986) (*quoting Shuffler v. Heritage Bank*, 720 F.2d 1141, 1148 (9th Cir. 1983).

In order to prevail on a motion for contempt, plaintiff must establish the acts of contempt by "clear and convincing evidence." *Balla v. Idaho State Board of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989). Once a *prima facie* case is established, the burden of production shifts to the non-moving party to prove either substantial compliance with the court's order or inability to comply. *United States v. Rylander*, 460 U.S. 752, 757 (1983).[37]

The parties' subjective intent is irrelevant. *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987). A failure to comply need not be willful or intentional. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

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[37] Under the collateral bar rule, the court may enforce a judicial order even though the underlying decision may be incorrect or even unconstitutional. *In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 725-29 (9th Cir. 1989) (exception to collateral bar rule governing witness found in contempt for refusing to reveal information did not extend to search warrant case). This rule stems from the widely held belief that the judicial process may be jeopardized if the parties are able to determine for themselves when and how to obey orders:

> The orderly and expeditious administration of justice by the courts requires that 'an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.'

Maness v. Meyers, 419 U.S. 449, 459 (1975) (quoting *United States v. United Mine Workers*, 330 U.S. at 293).

> A party cannot disobey a court order and later argue that there were "exceptional circumstances" for doing so. This proposed "good faith" exception to the requirement of obedience to a court order has no basis in law . . .

In re Crystal Palace Gambling Hall, Inc., 817 F.2d at 1365.

If a violating party takes all reasonable steps to comply with a court order, technical or inadvertent violations of the order will not support a finding of civil contempt. *Vertex Distributing Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 891-92 (9th Cir. 1982). A Court can make an inquiry or determine whether defendants failed to take all reasonable steps within their power to assure compliance with a court order. *Sekaguaptewa v. MacDonald*, 544 F.2d 396, 400 406 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

In assessing whether an alleged contemnor took "every reasonable step" to comply with the terms of a consent decree, a district court can consider (1) a history of noncompliance and (2) a failure to comply despite the pendency of the contempt motion. *Stone*, 968 F.2d at 857.

The Court finds that plaintiffs have shown by clear and convincing evidence that Director Lewis violated a specific and definite order of this Court, and that Lewis did not perform all reasonable steps to insure substantial compliance with the Consent Decree.

Director Lewis has a history of noncompliance with this Consent Decree. Lewis did not consult with counsel

prior to issuing the January 31, 1994 memorandum.[38] Lewis did not receive any evidence from anyone that the magazines had an effect on the misbehavior, assaults or other disorderly incidents in the prison system.[39]

Director Lewis not only knew that the appropriate method to modify a consent decree was a Rule 60(b) motion, Lewis failed to comply until the time set for the hearing before this Court. Indeed, the evidence clearly shows that Lewis only complied because plaintiffs filed a petition for contempt.

Believing Director Lewis' memorandum to be in disregard of a court order, plaintiffs filed a petition for criminal contempt, civil contempt and sanctions in connection with the January 31st memorandum. On February 25, 1994, this Court held an emergency hearing. On the same day, February 25, 1994, approximately two hours before the hearing, Director Lewis advised his attorneys that he was withdrawing his memorandum of January 31st, and would not put it into effect. Approximately an hour before the hearing, counsel for the defendants contacted plaintiffs' attorneys about the Director's withdrawal of the memorandum. A hearing was held and the Court was informed of the Director's decision. Director Lewis withdrew his written order with a written order only at the time of the hearing.

Director Lewis wilfully violated the Court's 1973 order when he issued his memorandum on January 31,

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[38] Testimony of Lewis, Transcript at 52.

[39] Testimony of Lewis, Transcript, at 50-60.

1994. Defendants did not establish with admissible evidence that the exclusion of the publications was permitted under the decree because there was a direct and immediate threat to the security, safety or order of the institution. The fact that in Director Lewis' opinion his magazine ban was justified has no relevance to whether he committed civil contempt and is not a valid defense. Lewis relied on no admissible evidence to reach his conclusion[40].

Director Lewis acted personally, based on no directive from higher authorities in the state government and he had no studies or other facts to warrant his violation of the order. The contempt is personal to Director Lewis. Based on the above authorities, Director Lewis was in civil contempt when he issued his January 31, 1994 order.

Director Lewis did not substantially comply until pressured to do so by plaintiffs' attorneys' actions in bringing this matter to this court's attention[41]. Lewis did not take all reasonable steps, or any reasonable steps, to comply with the Consent Decree, until forced to do so, and attorneys' fees and costs were incurred. Therefore, the Court finds that Director Lewis is personally in contempt of this Court's orders and shall pay the attorneys' fees and costs necessary to bring and resolve this petition for contempt.

It is valid to award attorney's fees and costs for preparing and pursuing a contempt petition. *Perry v. O'Donnell*, 759 F.2d at 705 ("Attorneys' fees frequently

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[40] Lewis testimony, Transcript, at 97-98.

[41] Transcript at 22; Lewis testimony, Transcript at 65.

must be expended to bring a violation of an order to the court's attention"; a "trial court should have the discretion to analyze each contempt case individually and decide whether an award of fees and expenses is appropriate as a remedial measure."); *Donovan v. Burlington Northern, Inc.*, 781 F.2d 680, 682 (9th Cir. 1986) (attorney's fees can be included in the calculation of damages). Attorneys' fees can be awarded as part of a civil contempt penalty. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923); *Signal Delivery Service, Inc. v. Highway Truck Drivers*, 68 F.R.D. 318 (E.D.Pa. 1975).

An award of attorney's fees for bad faith can serve the same purpose as a remedial fine imposed for civil contempt. *Hutto*, at 98 S.Ct. 2574, 437 U.S. at 692. An award of attorney's fees has "a compensatory effect" that "does not in any event distinguish it from a fine for civil contempt, which also compensates a private party for the consequences of a contemnor's disobedience." *Hutto*, 437 U.S. at 693, n. 17, citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911).

The Court awards attorneys' fees to plaintiffs in an amount to be determined upon application to the Court. This award is within the Court's discretion. *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991) (violation of court orders is subject to sanctions under the inherent authority of the Court); *In Re Crystal Palace Gambling Hall*, 817 F.2d 1361 (9th Cir. 1987) (attorneys' fees may be awarded in contempt proceedings); *Donovan v. Burlington Northern, Inc.*, 781 F.2d 680, 684 (9th Cir. 1986) (regardless of whether the civil contempt was willful, "the cost of bringing the violation to the attention of the court is part of the damages suffered by the prevailing party") (citations omitted);

Perry v. O'Donnell, 759 F.2d 702 (9th Cir. 1985) ("the trial court should have discretion to analyze each contempt case individually and decide whether an award of fees and expenses is appropriate as a remedial measure").

These fees are assessed against Director Lewis personally, and are not to be borne by the taxpayers or the State in any way. *See Newman v. State of Alabama*, 683 F.2d 1312, 1318 (11th Cir. 1982) ("there can be no doubt" that a district court has the authority to incarcerate a state official in criminal contempt matter).

The Supreme Court, in *Hutto*, stated:

> In this case, the award of attorney's fees for bad faith served the same purpose as a remedial fine imposed for civil contempt. It vindicated the District Court's authority over a recalcitrant litigant.

Id. at 692.

Finally, a court has the inherent power to assess attorney's fees as a sanction for the willful disobedience of a court order or when a party has acted in bad faith or for oppressive reasons. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975).

CONCLUSION

The issue in this contempt proceeding is not whether the inmates should or should not be allowed to receive certain types of magazines. Rather, the issue is whether the Director of the Department of Corrections is required to follow the law.

In this situation, this Consent Decree was entirely written, and agreed upon, by the ADOC and the inmates. Director Lewis has known for years that if he and the ADOC believed that any section, or all, of the *Hook* decree should be modified, the only proper method is by filing a Rule 60(b) motion. Until Director Lewis and the ADOC request a modification of the portion of the Consent Decree concerning the receipt of mail, including magazines, and establish with admissible evidence under the applicable law that a modification is proper, this Court cannot consider any arguments about whether the inmates should or should not receive certain types of magazines.

Director Lewis cannot unilaterally change the provisions of the Consent Decree. Plaintiffs cannot be required to file petitions for contempt to force Director Lewis' compliance with the Consent Decree. Director Lewis cannot defend his contempt of this Court and the law by withdrawing his memorandum at the very last minute, and only under coercion. Therefore, the Court finds that Director Lewis is personally in contempt of this Court's orders and shall pay the attorneys' fees and costs necessary to bring and resolve this petition for contempt.

Accordingly, IT IS ORDERED THAT:

(1) Plaintiffs' motion for civil contempt sanctions (Doc. # 317-2) against Director Lewis, individually, IS GRANTED.

(2) Defendants' motion to strike plaintiffs' reply to defendants' proposed findings of fact and conclusion of law (Doc. #349) IS DENIED.

(3) Plaintiffs shall file a current affidavit of reasonable attorneys' fees and costs no later than June 10, 1994.

(4) Director Lewis shall file a response no later than June 17, 1994.

Dated this 3 day of June, 1994.

/s/ C.A. Muecke
C.A. Muecke
United States District Judge

APPENDIX C

TREON, WARNICKE & DANN, P.A.
Attorneys at Law
100 West Washington
Suite 2250
Phoenix, Arizona 85003
Telephone: 602/252-4895

Attorneys for Plaintiffs

and

GARY K. NELSON
Arizona Attorney General
By RONALD L. CRISMON
Assistant Attorney General
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EVAN ARTHUR HOOK, et al., Plaintiffs-Petitioners, vs. STATE OF ARIZONA, ex rel., et al., Defendants-Respondents.	No. CIV 73-97 PHX CAM STIPULATION FOR ENTRY OF CONSENT DECREE (Lodged Oct. 16, 1973)

The parties above-named, by and through their respective attorneys undersigned, hereby stipulate and agree that the Court may enter its order and decree approving the attached proposed mail regulations of the Department of Corrections of the State of Arizona, and adjudging and decreeing that the same shall have the

same force and effect as though ordered by the Court, defendants to have 45 days time from the entry of the Court's order in which to fully implement said proposed regulations.

The attached proposed regulations are the product of out-of-court negotiations between the undersigned attorneys and representatives of the Department of Corrections and are acceptable to both sides. Plaintiffs' court-appointed attorney has met personally with several of the plaintiffs, including Evan Arthur Hook, concerning the negotiations and the proposed regulations. A copy of the proposed regulations, revised as of September 24, 1973, has been furnished to plaintiffs by counsel with the recommendation that they authorize counsel to enter into this stipulation. Accordingly, counsel is filing simultaneously herewith written consent of most of the named plaintiffs to the entry into this stipulation. Some of the original plaintiffs have been released from the Arizona State Prison since the initiation of this action, some have been transferred to other institutions maintained by the Department of Corrections and others are on outside trusty status and not readily available for signing. Filed as attachments to plaintiffs' written consent are two letters to counsel from two of the named plaintiffs, including Evan Arthur Hook, evidencing their consent and explaining the circumstances of circulating the consent form among the outside trusties named on the form.

Counsel will make themselves available to the Court should the Court desire to discuss the proposed regulations or any other aspect of this proceeding before entry of any order or decree.

DATED this 4 day of October, 1973.

TREON, WARNICKE & DANN, P.A.
Attorneys for Plaintiffs

By /s/ B. Michael Dann
B. Michael Dann

GARY K. NELSON, Attorney General
Attorney for Defendants

By /s/ Ronald L. Crismon
Ronald L. Crismon
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EVAN ARTHUR HOOK, et al., Plaintiffs-Petitioners, vs. STATE OF ARIZONA, ex rel., Defendants-Respondents.	CIV-73-97 PHX-CAM JUDGMENT

Pursuant to the stipulation filed herein on this same day, and good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED approving the attached proposed mail regulations of the Department of Corrections of the State of Arizona revised as of September 24, 1973, incorporating the same into this decree as though made a part hereof, defendants to fully implement said regulations within 45 days from the date of this order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED dismissing this action with prejudice, the parties to bear their own costs.

DONE this 19th day of October, 1973.

/s/ C. A. Muecke
C. A. MUECKE
U. S. DISTRICT JUDGE

SUBJECT: MAIL REGULATIONS

AUTHORITY: ARS 41-1604B (1) authorizes the Director to "promulage rules and regulations to implement the purposes of the Department and the duties and powers of the Director." ARS 41-1602B establishes as a purpose for the Department of Corrections the provision of supervisory staff and administrative functions of all adult and youth offenders. Unauthorized communications with or by a person in prison or detained therein is punishable as a crime under ARS 31-231.

POLICY: The flow of mail between persons outside a facility of the Department of Corrections with institution residents is encouraged for the purpose of maintaining constructive family and community ties, facilitating resolving of legal affairs, assisting the attainment of educational or vocational goals and stimulating motivations for self-improvement. Supervision of mail on a selective basis is an essential precaution required in the institution in the interest of the safety of personnel and security of the facility. Correspondence with persons outside the institution has potentially beneficial effects, including but not limited to maintaining family or other community resources desirable for planning for release on parole or after discharge by completion of sentence. Citizens outside the institution have a right to be informed as to the operation of *their* correctional facilities directly from the residents of them. However, the mail may not be used for illegal purposes or to introduce unauthorized materials into the institution.

DEFINITIONS: MAIL: Letters, publications, or packages delivered by the U.S. Post Office or by other means.

LETTERS: First class mail containing only personal communications and authorized enclosures.

LEGAL & OFFICIAL CORRESPONDENCE: Letters to or from an Attorney of Record, to a member of the State Bar to solicit the services of an attorney or any public official or employee in his or her official capacity.

CONTRABAND: Contraband items, the possession or mailing of which is unlawful and items not specifically defined as illegal but which a resident may not have in his possession as specified in published regulations of the Department of Corrections.

PUBLICATIONS: Reproduced written and/or pictorial matter released for public use including books, periodicals, newspapers, pamphlets, photographs, etc.

I INCOMING MAIL: All incoming mail will be opened for inspection for contraband only. Incoming mail from a resident's attorney of record or from a judge or court will be opened for inspection purposes in the presence of the resident. No incoming mail will be read or censored. The contents of mail opened for inspection will not be stamped or marked in any manner as evidence of inspection; however, the container, box or envelope may be so stamped or marked.

Unauthorized material in incoming mail (e.g. cash and other items) as defined by written and posted rules,

will be removed from the transmitted package or correspondence and returned to the sender. Residents will be notified in writing by the Mail Officer of all items returned. Illegal items discovered (e.g. drugs, weapons, etc.) will be held as evidence for law enforcement agencies.

All mail must be in accordance with postal laws and regulations. Senders may be prosecuted for violations of such laws or regulations regarding the placing of non-mailable material in the mails.

All postal money orders, cashier's checks and certified personal checks must be made payable to "The Arizona State Prison" and marked "for the account of" the resident. A receipt will be given the resident and the money deposited in the resident's trust account.

II OUTGOING MAIL: All outgoing correspondence will be submitted for mailing in unsealed envelopes and placed in locked mail boxes located throughout the institution. Collections shall be made at least once a day, Monday through Friday except legal holidays. Mail deposited after 12:00 P.M. on Fridays will not be collected until the next working day provided it is not a legal holiday. Letters to a resident's attorney of record or to a judge or court will be brought to the mail room by the resident where the letter will be inspected for contraband and sealed in the presence of the resident.

Letters to a resident's immediate family, (wife, husband, children, parents or grandparents – this includes step-children and step-parents) will not be censored or read, but will be inspected for contraband.

Residents may correspond with the publisher or editor of any newspaper, news magazine or periodical of general distribution, national or international news service or to the station manager of any radio or television station. Such mail will not be censored or read but will be inspected for contraband.

Correspondence to the Director or Deputy Directors of the Arizona Department of Corrections may be submitted for mailing in sealed envelopes and will not be read or censored by the institution.

Inmates will be permitted to correspond with elected or appointed public officials concerning business or legal matters. Correspondence to such officials will be submitted to the Mail Office in unsealed envelopes where it will be inspected for contraband but will NOT be censored.

The institution will censor up to 10% of the outgoing correspondence except as outlined above. All correspondence so censored will be stamped appropriately on the inside flap of the envelope. All uncesored [sic] correspondence will be stamped appropriately to signify that it has been "inspected" on the inside flap of the envelope or package.

Standards for Censorship

Contents of censored mail may be returned to the resident, or retained by the institution, or deleted from the mailing (the balance of which shall be mailed) where the contents or communications either would or might pose a direct and immediate threat to the security, safety or order of the institution; or are obscene under applicable constitutional standards; or would or

might substantially hinder efforts to treat or rehabilitate the resident; or would otherwise constitute a violation or circumvention of these correspondence regulations or the institution's disciplinary rules and regulations.

Residents may send an unlimited number of letters to individuals of their choice except no correspondence is allowed to the following:

A. Ex-inmates who are currently under supervision by the Arizona Department of Corrections except members of the resident's immediate family as stated above.

B. A resident of any penal institution except above listed family members.

C. To a minor without parental consent except a resident's own child or step-child.

D. The victims or the family of victims of the crime committed by the resident.

E. Anyone to whom lewd, threatening or similar offensive material has been sent by the resident, until such person requests, in writing, that correspondence again be allowed.

F. Anyone to whom correspondence is directed with the intent to plot, scheme or conspire to defraud or otherwise unlawfully solicit assistance.

III PUBLICATIONS Residents may receive books, newspapers and periodicals etc., if mailed directly by the publisher or book retailer. Individual issues of publications will be excluded if they contain instructions on the manufacturing of homemade weapons, bombs, explosives, escape material, brewing of alcoholic beverages, or if they otherwise contain material which constitutes a

direct and immediate threat to the security, safety or order of the institution, or if they contain any material which is deemed obscene under applicable constitutional standards. Prompt written notice will be given a resident if any publications are excluded for the above reasons. Upon request, the resident will be given an opportunity to discuss the reasons for the exclusion with the Deputy Superintendent for Programs, whose decision shall be final.

Residents of the Diagnostic Reception Center will be permitted to receive only newspaper publications.

On transfer between institutions, it is the resident's responsibility to arrange change of address for newspapers and other publications. The institution does not assume responsibility for forwarding such publications during this interim period but will attempt such forwarding for a reasonable period of time following a resident's transfer.

IV CORRESPONDENCE, SUPPLIES AND POSTAGE The institution shall provide free writing paper and envelopes to all residents. Stamps will be available for purchase. The state will pay postage for up to three (3) pieces of first class domestic mail, weighing one ounce or less (requiring one eight cent stamp) per seven day week for all *indigent* institution residents. All postage required beyond the limits cited above, and all postage for resident groups or organizations shall be at their own expense.

All outgoing mail must bear the name and address and living quarters of the sender. *Incoming bulk mail* will

not be delivered unless each piece is individually addressed to a resident by name.

V GIFT PACKAGES – INCOMING Residents at all adult correctional institutions, except while in the Diagnostic-Reception Centers, may receive gift packages from those persons whose names appear on the resident's approved visiting list. No soap, shampoo, toothpaste, deodorants, cigarettes, cigars, tobacco, vitamins or medicines may be included in packages. Food items may be sent only at Christmas and may not be packed in glass containers. A limit of three (3) packages of twenty-five (25) pounds each per resident will be permitted at Christmas time (December 10-31).

All Packages will be opened and inspected. Unauthorized packages and contraband contained in packages will be returned to the sender at the resident's expense, if he so agrees. If a resident has insufficient funds or does not authorize the expenditure, disallowed items may be donated to a charity designated by the resident. If the resident does not designate a charity or if the sender does not agree to pay the expense of returning the disallowed items within sixty (60) days of receipt, the institution will dispose of the items as directed by the Deputy Superintended for Programs. It should be noted that a designated charity must be local.

VI PACKAGES AND MONEY ORDERS (OUTGOING) Residents may send packages of their own non-contraband personal property, or their own properly approved hobby, craft or curio work. Such packages shall be made and sent at the resident's own expense. Residents may *not* send items to be sold at retail or wholesale.

Residents must bring all outgoing packages to the mail room unsealed for inspection. After inspection, the packages may be retained for investigative purposes for a period of ten (10) days. Packages will then be sealed by the mail room staff for mailing.

Residents may send money orders to the members of their immediate families or attorneys of record on a routine basis. Requests to send money orders shall be submitted to the Secretary's Office via the Warden's mail box. Requests to send money orders to others than a member of the immediate family or attorney of record will be screened by a committee appointed by the Deputy Superintendent for Programs.

All requests for money orders will be approved and mailed, or disapproved, within a period of five (5) working days.

VII MAIL ROOM Mail Room personnel will make at least daily collections of outgoing mail from locked mail boxes. Such collections will be made Monday through Friday except holidays and pursuant to normal operating conditions.

Incoming first class mail delivered to the institution on Saturdays will be delivered to the residents.

In all cases, incoming and outgoing mail shall be delivered or mailed, as the case may be, with all reasonable dispatch.

Telegrams and special delivery mail shall be delivered to the resident with all possible speed and no later than twelve (12) hours after receipt by the institution.

No mail or packages will be handled by resident personnel.

Under the direction of the Deputy Superintendent for Programs, records will be maintained detailing the date, names and articles involved in the following actions:

1. Incoming and Outgoing Registered, Insured and Certified Mail:
   A. The sender's name and address
   B. The addressee's name and address
   C. The date and name of the staff logging such mail
2. Incoming Packages:
   A. Name of the resident
   B. Name and address of the sender
   C. Property receipt describing contents of the package
   D. Date and name of the staff logging package.
3. Outgoing Gifts:
   A. Certificate of mailing, if insured.
   B. Name of sender
   C. Addressee's name and address
   D. Description of Contents
   E. Cost of sending package
   F. Date sent and name of staff logging package.
4. Expenses incurred in the transmittal of mail through the mail room.

5. Contraband List:
   A. Sender's name and address
   B. Addressee's name and address
   C. Date of receipt
   D. Description of contraband
   E. Disposition of contraband

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVAN ARTHUR HOOK, et al., Plaintiff-Appellee, vs. SAMUEL LEWIS, Director of the Arizona Department of Corrections, STATE OF ARIZONA, et al., Defendants-Appellants.	No. 94-16190 D.C. No. CV-73-00097-CAM
EVAN ARTHUR HOOK, et al., Plaintiff-Appellee, vs. STATE OF ARIZONA, et al., Defendant-Appellant.	No. 95-15105 D.C. No. CV-73-00097-CAM ORDER (Filed Jan. 30, 1996)

Before: KOZINSKI and NOONAN, Circuit Judges, BREWSTER**, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Kozinski and Noonan reject the suggestion for rehearing en banc and Judge Brewster so recommends.

** The Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Supreme Court, U.S.
FILED
APR 16 1996
CLERK

No. 95-1520

In The

Supreme Court of the United States

October Term, 1995

THE STATE OF ARIZONA, *et al.*,

Petitioners,

v.

EVAN ARTHUR HOOK, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN P. FRANK
Counsel of Record
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, Arizona 85004-4429
(602) 262-5311

COUNTERSTATEMENT OF QUESTION PRESENTED

A state official violated a consent decree by an order of his own; he took steps toward withdrawing that order a few minutes before the federal district court was about to hear a criminal contempt proceeding. May the district court find a civil contempt and assess counsel fees for the labors involved in bringing the officer to court and inducing him thereby to terminate his illegal conduct?

PARTIES TO THE PROCEEDING BELOW

Petitioners (appellants below) are the State of Arizona, Terry L. Stewart, the current Director of the Arizona Department of Corrections, and Samuel A. Lewis, who held the position of Director during the proceedings below.

Respondents (appellees below) are members of all successors to members of a class of Arizona prison inmates claiming under a consent decree between these parties.

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Respondents submit that the Petition for Writ of Certiorari should be denied.

OPINIONS BELOW

The summary order of the court of appeals affirming is correctly contained in the Petition as Appendix A. The opinion of the United States District Court for the District of Arizona, not published, is correctly included in the Petition as Appendix B.

STATEMENT OF JURISDICTION

On October 19, 1995, the District Court for the District of Arizona entered its judgment with an extensive opinion correctly set forth as Appendix B to the Petition. The Ninth Circuit Court of Appeals summarily affirmed "For the reasons stated in the district court's Orders" and petition for rehearing en banc was denied. *See* App. A, p. 2, and App. D of the Petition, p. 2 ("no judge of the court has requested a vote on the suggestion for rehearing en banc"). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 401:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

One issue in the courts below was whether the fees were to be paid by the Director of Corrections personally or by the State.[1] The payment is secured by a supersedeas bond with ultimate responsibility on the State, and no issue relating to the fees is brought here on the petition.

---

[1]Those fees, which were sharply reduced from the norm, were committed by court-appointed counsel to a public charity since counsel believed that it had a professional duty to protect the integrity of an article III court.

REASONS FOR DENYING THE PETITION

In 1973, the Arizona Department of Corrections and representatives of the prisoners entered into a consent decree concerning items that could be delivered to prisoners. Some years prior to the instant case, by his own fiat, the Director entered an order which conflicted with the stipulated decree. The Ninth Circuit Court of Appeals then expressly told him that if he wished to have the order altered, he could not do it by fiat, but must apply to the Court for a modification. The exact language of the Court of Appeals was "[a]s the district court held, the proper approach to this problem is to bring a Rule 60(b) motion; the Department cannot simply disregard the consent decree." *Hook v. State of Arizona*, 972 F.2d 1012, 1017 (9th Cir. 1992).

In the instant case, the Director did it again. Entirely on his own, according to his testimony, he issued a new order conflicting with the consent decree. As the district court's opinion, adopted by the Circuit, shows, he simply ignored the earlier mandate of the Ninth Circuit that if the stipulated order was to be modified, an application must be made to the Court to modify it.

The class then made clear that if the order were not withdrawn, it would file for criminal contempt. The order was not withdrawn and, indeed, was reaffirmed. An application for criminal contempt was then filed with hearing to be held at 3:00 p.m. on a given day. A few minutes before the hearing, counsel for the class was informally told that the order would be withdrawn. At the hearing at three o'clock, the court was so advised. The class immediately, and in open court, withdrew its request for criminal contempt, but asked for a civil contempt order and for a remedy covering the costs the class had been put to in bringing the matter to the court. The order was not, in fact, formally withdrawn until after that hearing.

The trial court in an extensive opinion found that there had been a civil contempt and assessed the fees as compensation.

The entire argument of the Director here is that no contempt ever occurred because, as the trial court expressly found, under threat of criminal contempt the Director withdrew the order before it could be enforced. The notion of the Director here is that he may operate in flagrant criminal contempt up to the very moment of enforcing an illegal order and then dance away from it with no consequences.

The contempt was the issuance of the illegal order in the first place without obeying the mandate of the Ninth Circuit to apply for a modification of the order if the Director wanted a modification.

In finding Director Lewis in contempt the district court acted well within the scope of its authority. Civil contempt is appropriate against state officials for failing to comply with court orders, *Hutto v. Finney*, 437 U.S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978). As background, this Court stated in part:

> In exercising their prospective powers under *Ex parte Young* [, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908),] and *Edelman v. Jordan*, [415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974),] federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties. A criminal contempt prosecution for "resistance to [the court's] lawful . . . order" may result in a jail term or a fine.

Id. at 690, 98 S. Ct. at 2573. *See also Newman v. State of Alabama*, 683 F.2d 1312, 1318 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

The fact that Director Lewis capitulated in the face of pressure just short of yet another court order is irrelevant. According to the Supreme Court, "the difference between retroactive and prospective relief 'will not in many instances be that between day and night.'" *Hutto*, 437 U.S. at 691 (quoting *Edelman v. Jordan*, 415 U.S. at 667). The *Hutto* Court thus held that an award of attorneys' fees against corrections officials for bad faith in failing to comply with a court order "served the same purpose as a remedial fine imposed for civil contempt," and "the allowance thereof may incline the Department to act in such a manner that further protracted litigation about the prisons will not be necessary." *Id.* at 691.

Appellants' fuss about the withdrawal is an attempt to muddy the waters in a clear area. Quite simply, no "fine" for contempt after the order was withdrawn was assessed, and no punishment for noncompliance was imposed. Rather, appellees were awarded the attorneys' fees they incurred in bringing the contempt to the court's attention. Not only was this appropriate, it would have been improper not to award those fees. *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1367 (9th Cir. 1987) (assessing attorneys' fees in civil contempt is appropriate); *Donovan v. Burlington Northern, Inc.*, 781 F.2d

680, 684 (9th Cir. 1986) (regardless of whether the contempt was willful, "the cost of bringing the violation to the attention of the court is part of the damages suffered by the prevailing party") (quoting *Perry v. O'Donnell*, 759 F.2d 702, 705 (9th Cir. 1985)). "[T]he trial court should have the discretion to analyze each contempt case individually and decide whether an award of fees and expenses is appropriate as a remedial measure". *Id.*

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED.

April 1996.

John P. Frank
Counsel of Record
Lewis and Roca LLP
40 North Central Avenue
Phoenix, Arizona 85004-4429
(602) 262-5311

Attorneys for Respondents